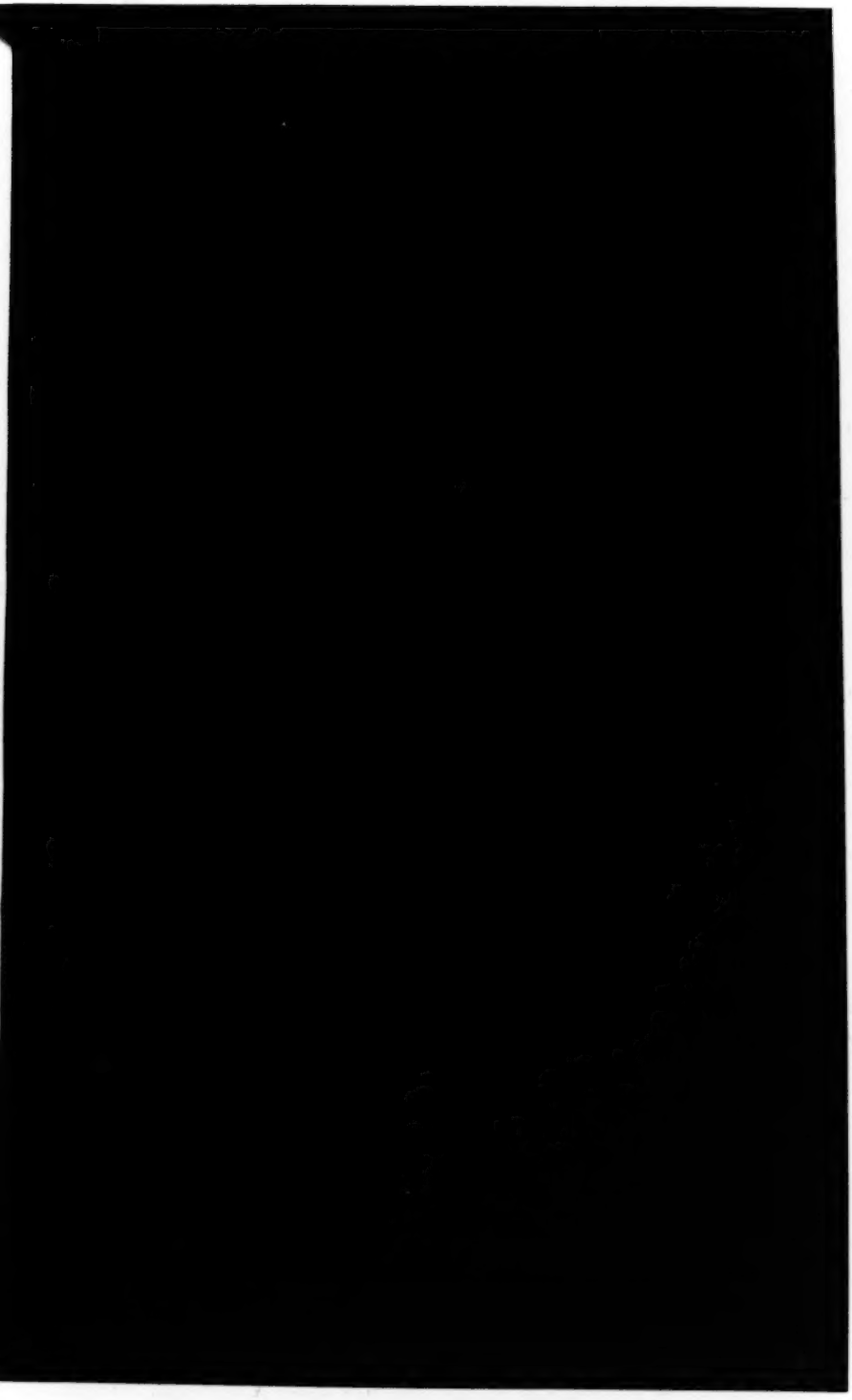

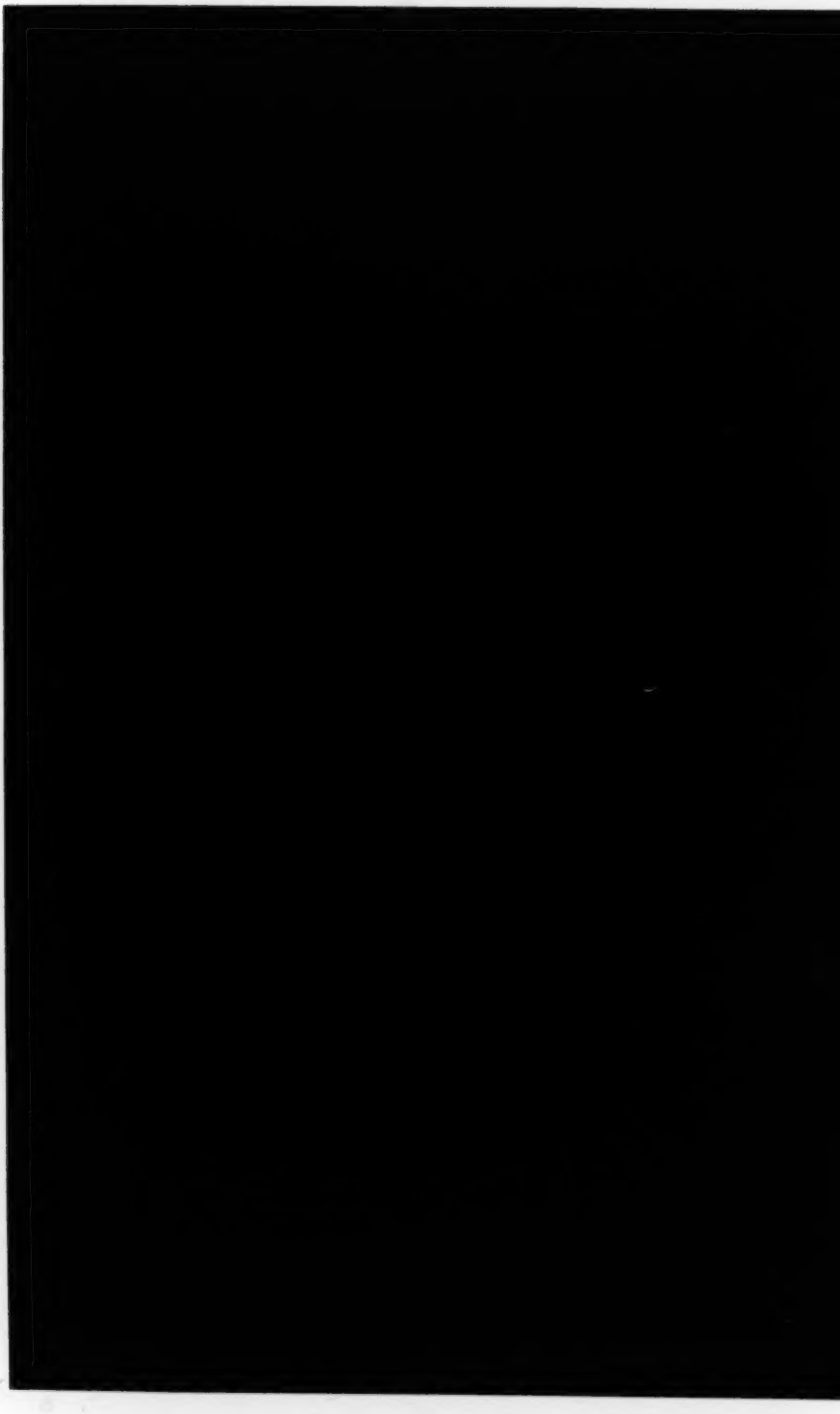

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-29

CORNING GLASS WORKS, A CORPORATION, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

No. 73-695

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

CORNING GLASS WORKS, A CORPORATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND THE THIRD CIRCUITS

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (2d Cir. App. 195-215)[1] is reported at 474 F. 2d 226. The opinions of the District Court for the Western District of New York are reported at 319

[1] "2d Cir. App." refers to the printed appendix in No. 73-29, and "3d Cir. App." refers to the printed appendix in No. 73-695. "J.A. (2d Cir.)" and "J.A. (3d Cir.)" refer to the parties' joint appendices in the respective courts of appeals.

F. Supp. 1161 (2d Cir. App. 145–167) and 330 F. Supp. 46 (2d Cir. App. 180–190).

The opinion of the Court of Appeals for the Third Circuit (3d Cir. App. 195–208) is reported at 480 F. 2d 1254. The opinion and supplemental findings of the District Court for the Middle District of Pennsylvania (3d Cir. App. 175–193) are reported at 341 F. Supp. 18.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 2, 1973 (2d Cir. App. 216–217). Corning's petition for a writ of certiorari in No. 73–29 was granted on December 17, 1973, and the case was ordered consolidated with No. 73–695 (2d Cir. App. 217).

The judgment of the Court of Appeals for the Third Circuit was entered on June 28, 1973 (3d Cir. App. 209). The government's petition for a writ of certiorari in No. 73–695 was granted on December 17, 1973, and the case was ordered consolidated with No. 73–29 (3d Cir. App. 210).

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. 206(d)(1), prohibit an employer from paying a higher base wage to male night shift inspectors performing the same work as female inspectors on the day shifts, where the wage differential (1) was adopted to induce men to perform

"female work" and (2) is paid in addition to a night shift bonus which is paid to all employees, regardless of sex, for night work.

2. Whether Corning cured any prior equal pay violations in its New York plant in June 1966, when without raising the lower wage rates paid to its women (day shift) inspectors, it began to allow women to work on the night shift at the higher male rates, while at the same time allowing men to work on the day shifts at the lower female rates.

3. Whether Corning cured any equal pay violations in its New York plant in January 1969, when it established equal wage rates for inspectors on the day and night shifts, but at the same time raised the rates for the night shift inspectors then employed to a still higher level and "red circled" those rates, thereby continuing the differentials that had previously existed between day and night shift inspectors.

STATUTE INVOLVED

Section 6(d)(1) of the Fair Labor Standards Act of 1938, as amended by Section 3 of the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d)(1), provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal

> work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Other pertinent provisions of the Equal Pay Act of 1963 include the Congressional findings contained in Section 2(a) of the Act and that part of Section 3 which amended the Fair Labor Standards Act of 1938 by adding to it Section 6(d)(2).

Section 2(a) of the Equal Pay Act of 1963, 77 Stat. 56, provides:

> The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—(1) depresses wages and living standards for employees necessary for their health and efficiency; (2) prevents the maximum utilization of the available labor resources; (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burdens commerce and the free flow of goods in commerce; and (5) constitutes an unfair method of competition.

Section 6(d)(2) of the Fair Labor Standards of 1938, as amended by Section 3 of the Equal Pay Act of 1963, 77 Stat. 57, 29 U.S.C. 206(d)(2), provides:

> No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

STATEMENT

These actions were brought by the Secretary of Labor in the United States District Courts for the Western District of New York and the Middle District of Pennsylvania to enjoin Corning Glass Works ("Corning") from paying lower wages to women inspectors employed at its plants in Corning, New York (No. 73–29) and Wellsboro, Pennsylvania (No. 73–695),[2] than it paid to men performing the same work, excluding wage differences attributable to contractual shift differentials. The Secretary alleged that the wage differential discriminated against women inspectors on the basis of sex in violation of the equal pay provisions of the Fair Labor Standards Act, known as the Equal Pay Act of 1963 (29 U.S.C. 206(d)(1)), and sought to restrain Corning from further violations of the Act and from withholding back pay due to women inspectors because of past violations.

[2] A third case involving Corning and the same pay practices is currently pending in Rhode Island, Civil Action No. 4036.

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Until June 1, 1966 (in New York) and until October 16, 1966 (in Pennsylvania) Corning employed only women as inspectors during the day shifts and only men to do such work at night (except during World War II) (2d Cir. App. 150, 151; 3d Cir. App. 176). When the practice of employing men inspectors at night was instituted, Corning did not pay shift differentials (*ibid.*) and the men in all other job classifications were paid the same base wages, regardless of shift (2d Cir. App. 198, n. 3; 3d Cir. App. 184–185). Nonetheless, Corning historically paid its men inspectors a higher base wage than it paid to women inspectors. When Corning adopted a plant-wide shift differential to be paid to all employees working at night, that differential was added to the higher base wage paid to men inspectors (2d Cir. App. 151; 3d Cir. App. 184).

Corning denied that its concededly unequal wage rates were subject to the equal pay provisions of the Fair Labor Standards Act, claiming that otherwise identical work performed at night and during the day is not "performed under similar working conditions" within the meaning of the Equal Pay Act, and that the Act is therefore inapplicable to its wage policies, however discriminatory they may be. Alternatively Corning argued that, if the inspection work on the day and night shifts was found to be equal, full compliance with the Act was achieved either in 1966, when Corning opened job vacancies on the night shift to women, or in January 1969, when Corning established equal wage rates for inspectors on all shifts, but at the same time raised the rates for the night

shift inspectors then employed to a still higher level and "red circled" those rates.[3]

Each of Corning's contentions was rejected by both the District Court for the Western District of New York and the Court of Appeals for the Second Circuit in No. 73–29. In No. 73–695, however, the District Court for the Middle District of Pennsylvania and the Court of Appeals for the Third Circuit sustained Corning's argument that the Equal Pay Act was inapplicable to its wage policies, because night and day work are not "performed under similar working conditions." Those courts did not pass on Corning's other defenses.[4]

1. Prior to 1925, the only inspectors employed by Corning were women who worked on both the day and the afternoon shifts. These women were paid individual wage rates which ranged from 20 to 30 cents per hour (2d Cir. App. 101–103). In that year, Corning started automating its plants for around-the-clock production. It therefore became necessary to

[3] Corning also claimed that the night shift inspectors exerted greater effort than the day and afternoon inspectors, and further, referring to one inspector classification at the Pennsylvania plant, that the men in that particular classification exercised greater responsibility. Contrary to Corning's statement that the "effort" issue was not dealt with by the Second Circuit (Corning Br., p. 15), that court, after referring to the district court's findings on the issue, specifically held that the effort exerted by the night shift inspectors in performing their own utility work constituted such an "inconsequential difference" that it did not render the jobs unequal (2d Cir. App. 208–209).

[4] The District Court for the Middle District of Pennsylvania did, however, enter supplemental factual findings with respect to those contentions (3d Cir. App. 182–193).

have inspectors on all three shifts (2d Cir. App. 37; 3d Cir. App. 28). Since Pennsylvania and New York law both prohibited the employment of women after midnight, Corning had to employ men as night shift inspectors (2d Cir. App. 37; 3d Cir. App. 29). The record in the New York case (No. 73–29) indicates that most of these men came from blowing rooms where the lowest wage rate was 48 cents per hour (2d Cir. App. 108–109). As night shift inspectors these men received 53 cents per hour. This higher wage for men was explained by Corning's Manager of Statistics and Surveys, Mr. McKibbin, as follows (2d Cir. App. 108):

> Q. You state * * * that the inspection worker enjoyed less prestige than other activities on the night shift. Was it dirtier work? A. No, I think it was considered to be female work.

Later, in explaining the increase, Mr. McKibbin mentioned the loss of incentive pay which the men could earn in the blowing room, then added (2d Cir. App. 109):

> [T]he increase in their base rate was necessary to encourage them to take this demeaning work.
>
> Q. Demeaning because it was women? A. In their judgment, it was demeaning.

Accordingly, the district court in the New York case concluded that "in order to obtain male employees willing to perform what was regarded by the male employees as female work, [Corning] had to pay the male employees a higher rate than it paid female employees who performed inspection work on the day and afternoon shifts" (2d Cir. App. 150). As the

parties stipulated: "When male inspectors were first assigned to the steady night shift, hiring rates were determined by what an employer had to pay to fill his needs in the community market place" (3d Cir. App. 28). And, as one of Corning's witnesses candidly admitted, the men "just wouldn't work at the women's rate" (2d Cir. App. 116, 119). The male inspectors were therefore paid a higher rate even though the company was not paying extra compensation for night work at that time, since all "male only" jobs carried the same base rate regardless of shift (2d Cir. App. 198, n. 3; 3d Cir. App. 184–185).

Corning did not pay shift differentials until it was organized by a union in 1944 and required to do so by a collective bargaining agreement.[5] The first contract made no changes in Corning's existing base rate schedules (including those established for men and women inspectors) (2d Cir. App. 39; 3d Cir. App. 30) but it did require Corning to develop an equitable wage rate plan for all job classifications (3d Cir. App. 74, 124). Pursuant to this provision, Corning adopted a job classification system developed by its consultants Stevenson, Jordan and Harrison, the "SJ&H plan" (2d Cir. App. 45–46; 3d Cir. App. 74). The SJ&H plan described and evaluated the inspector jobs on the basis of "general schooling," "training period," "manual skill," "versatility," "job knowledge,"

[5] The 1944 union contract established shift differentials of 3 cents per hour for employees on the nonrotating afternoon shift and 5 cents per hour for those on the nonrotating night shift (2d Cir. App. 40; 3d Cir. App. 31). These differentials, the validity of which is not challenged by the Secretary, have since been increased to 10 and 16 cents per hour (2d Cir. App. 176; 3d Cir. App. 31).

"responsibility," and "working conditions" (2d Cir. App. 100; 3d Cir. App. 69). Under this evaluation, the inspector jobs, regardless of shift, were found to be equal in all respects, including "working conditions" (2d Cir. App. 45; 3d Cir. App. 69), which were defined by the SJ&H plan as the "surrounding conditions (wet, heat, cold, dust, grease, noises, etc.) and physical hazards (bruises, cuts, heavy lifting, fumes, slippery floors, machines, chemicals, gases, bodily injuries, etc.) to which employees are unavoidably subjected while performing the[ir] duties" (Exh. J. to Pltf's Exh. 1 in No. 73–695; 2d Cir. App. 61, 63, 66, 98–99).

Despite this equal evaluation, the women inspectors continued to receive lower base rates than the men since the SJ&H plan established separate male and female rate schedules which differed from each other even though the jobs had been assigned the same number of evaluation points.*

These differentials between men and women inspectors were maintained, not only in each succeeding union contract (2d Cir. App. 39, 124–125; 3d Cir. App. 76), but also after Corning re-evaluated the jobs under the Corning Glass Works (CGW) plan in 1963 and 1964 (2d Cir. App. 39, 75, 79, 83, 87; 3d Cir. App.

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* Thus in October 1947, the women inspectors at the Pennsylvania plant, whose job evaluation points ranged from 250 to 415, were paid maximum rates between $0.915 and $1.035 per hour whereas men inspectors, whose job evaluation points also ranged from 250 to 415, were paid maximum rates $1.105 and $1.255 per hour (3d Cir. App. 69, 173–174). Not only were the women inspectors paid less than the men inspectors, they were also paid less than even the hiker or utility workers whose job evaluation points were only 235 (*ibid.*).

65–66). The CGW plan, like the SJ&H plan, defined "working conditions" as the job's physical surroundings and hazards (2d Cir. App. 69–70, 74, 78, 82, 86, 91; 3d Cir. App. 65, 92–93); the definition did not include the time of day worked (2d Cir. App. 32–33, 65–67; 3d Cir. App. 65, 84). Also, like the SJ&H plan, the CGW re-evaluation found no significant differences in the duties performed by the men and women inspectors and awarded the same point values for skill, effort, responsibility and working conditions, regardless of shift (2d Cir. App. 45; 3d Cir. App. 66).

Thus, under both the SJ&H plan and the CGW plan, the greater burden of night work, like the greater burden of working on the afternoon shift from 2 p.m. to 10 p.m., was compensated by a shift differential, and not by varying the job evaluation of "working conditions." This was stated by Corning's expert witness, Dr. Paul Lehoczky (3d Cir. App. 93):

> Q. How do[es] [Corning] compensate employees for working at different times of day?
>
> A. They compensate them by a shift differential * * *.

Dr. Lehoczky added that "time of day worked" is "not [an element] carried in a job evaluation system" and that time or shift differences, like overtime work and work on Sundays, are considered a "wage condition" and not a "working condition" (3d Cir. App. 97). Corning's manager of job evaluations at its New York plant, Mr. Noble, similarly testified that time of day worked is not considered a working condition (2d Cir. App. 66–67; see also *id* at 69–71, 95, 98–99).

Following enactment of the Equal Pay Act, Corning distributed an intra-company memorandum to its plants which requested that they "make a comparison of female to male jobs" and identified as problem areas those "[p]lants using SJ&H Evaluation System Discriminatory Wage Schedules" (2d Cir. App. 128–130; 3d Cir. App. 61). Despite this memorandum, Corning did not raise the wage rates of its women inspectors, but instead (within a day or two days of the date the Act became applicable to the particular plants)[7] merged the separate "male" and "female" wage schedules into a single wage schedule (2d Cir. App. 153; 3d Cir. App. 190). This single schedule, rather than correcting the discriminatory wages, preserved exactly the same differentials that had previously existed between the men and women inspectors by placing the women into lower labor grades on the revised schedule (2d Cir. App. 57–58, 110–115, 153; 3d Cir. App. 76–77, 133–134, 168–170, 190).

Later, in 1966, Corning merged its separate seniority lists for males and females (2d Cir. App. 19–20, 32, 43–44; 3d Cir. App. 29, 48–49), and since that

[7] The rate schedules were merged in New York effective June 11, 1964, the first effective date of the Act (2d Cir. App. 153). The merger of rate schedules in Pennsylvania took place on January 18, 1965 (3d Cir. App. 190). Corning apparently believed the Act became applicable to its Wellsboro, Pennsylvania, plant on January 20, 1965 (2d Cir. App. 129). However, since Corning's collective bargaining agreement for its Wellsboro plant was reopened on January 24, 1964 (J.A. (3d Cir.) 987), some seven months after enactment of the Equal Pay Act, that plant also became subject to the Act's requirements on June 11, 1964, by reason of Section 4 of the Act (77 Stat. 57).

time women, who had previously been restricted to the day and afternoon shifts, have been permitted to exercise their seniority to obtain jobs on the night shift (2d Cir. App. 43–44; 3d Cir. App. 38).[8] They were not, however, allowed to bump less senior men inspectors employed on the higher paying night shift. Instead, the women either had to fill out transfer requests and wait for vacancies in the case of non-bid jobs, or bid for jobs when they became vacant in the case of bid jobs (2d Cir. App. 43–44; 3d Cir. App. 49, 104, 190), and then remain on the new job for a period of 84 days (at least in Pennsylvania) before they could use their plant seniority to avoid dismissal in the event of a reduction of force (3d Cir. App. 77, 190).[9]

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[8] Contrary to Corning's statement (Corning Br., p. 9), the New York law, as amended in 1953, contained no requirement that made union-management agreements a condition precedent for an employer to apply to the State Industrial Commissioner for permission to employ females over 21 years of age to work after midnight. All the Commissioner had to find was that "satisfatory conditions exist, including adequate transportation and safeguards for the protection of the health and welfare of the wom[e]n" (N.Y. Labor Law §§ 173(3)(a)(1) and (3)(e) (McKinney 1965)).

[9] Corning suggests (Corning Br., p. 10, n. 25) that these restrictions cannot have had any adverse effect on women really wanting to transfer to the night shift, pointing out that since its Pennsylvania plant had 395 inspector "openings" on its night shift during the years between 1966 and 1970, all of the women employed prior to that time could have had a night shift job. This statement ignores the fact that beginning in 1964, when Corning started mechanizing its operations, it has needed fewer and fewer inspectors. For example, the number of

The final change instituted by Corning occurred on January 20, 1969, when it abolished its separate base wage rates for the day and night shift inspectors and established the same wage rates for all three shifts (2d Cir. App. 19; 3d Cir. App. 53). At the same time, however, through the device of retroactive wage increases, Corning raised the rates for its night shift inspectors then employed to higher levels than those established under its new job evaluation plan and "red circled" these rates, thereby continuing the differentials that had previously existed between day and night inspectors (2d Cir. App. 168–170, 178–179; 3d Cir. App. 54–55).[10]

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inspector-packer positions on the night shift has declined from 21 to 8, and the job of night-positioner-inspector has been eliminated altogether (3d Cir. App. 32, 79). In these circumstances, it is not surprising that the more senior women would not risk their job security by transferring to the night shift where, during the first 84 days, they could be bumped by night shift employees junior to them in plant seniority. Significantly, the junior employees identified by Corning as having obtained night shift jobs after October 1966 retained these jobs for only four weeks or less (3d Cir. App. 100, 121).

[10] The manner in which the "red circled" rates perpetuated the existing differentials may readily be seen when particular wage rates are examined. For example, at the Pennsylvania plant, the night shift quality inspectors, at the time of the January 20, 1969 agreement, were being paid $2.725 per hour (3d Cir. App. 163, 53–54). The quality inspectors on the day and afternoon shifts were being paid $2.49 per hour (3d Cir. App. 56, 163). The January 20, 1969 agreement established a single new "job evaluation" rate for quality inspectors on all three shifts of $2.79 per hour, or 6½ cents per hour more than the quality inspectors on the night shift and 30 cents per hour more than the quality inspectors on the day and afternoon shifts were then making (3d Cir. App. 53, 160). However, the agreement further provided for retroactive pay increases dating from November 4, 1968 (2d Cir. App. 177–179). Under this

2. *a.* The courts below in No. 73–29 concluded that Corning violated the equal pay provisions of the Fair Labor Standards Act by paying a higher base wage to men inspectors on the night shift performing the same work as women inspectors during the day, where the higher base wage was paid in addition to a regular night shift bonus. Those courts rejected Corning's contention that similar work performed at night and during the day was not within the Act's definition of equal work, because it was not work "performed under similar working conditions." In affirming the judgment of the district court, which had rejected this contention, the court of appeals (Friendly, C. J.) explained that while Corning's contention would seem to be true "[t]o those uninitiated in the language of industrial relations" (2d Cir. App. 202), it is clear from the "legislative history * * * that the time at which work is performed was not regarded as a 'working condition' but rather as a

provision, the rate for night shift quality inspectors was increased to $2.945 per hour and the day and afternoon shift rate was increased to $2.69 (3d Cir. App. 161). Since the retroactive wage rate for the day and afternoon shifts was still less than the new "job evaluation" rate, quality inspectors on those shifts received the new "job evaluation" rate of $2.79 per hour for the period following January 20, 1969 (3d Cir. App. 160); since, however, the retroactive wage rate for night shift quality inspectors was 15½ cents more than the new "job evaluation" rate, the higher retroactive rate was "red circled" (2d Cir. App. 177–179; 3d Cir. App. 53) and the difference between it and the new "job evaluation" rate was continued even after January 20 rate increases (2d Cir. App. 183). Under this arrangement, any employee with plant seniority as of or prior to January 20, 1969, who holds, or who subsequently takes, a job as inspector on the night shift receives the "red circle" rate (2d Cir. App. 177–179; 3d Cir. App. 54–55).

proper subject for 'a differential based on any other factor other than sex'" (2d Cir. App. 203). The court pointed out that the term "similar working conditions" was added to the Act's definition of "equal work" only after a Corning expert urged Congress to adopt the formulation used in most job classification systems, including Corning's, which "[u]nder 'working conditions' * * * listed two factors: 'surroundings' * * * and 'hazards'" (*ibid.*).

The courts in No. 73–29 also ruled that the higher base rates of Corning's men inspectors could not be justified under the "factor other than sex" exception. As the Second Circuit commented, "[t]he plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called 'female work.' This is the very condition at which the Equal Pay Act was aimed" (2d Cir. App. 207–208). The court of appeals also noted the lack of "evidence that any other night employees received higher pay than corresponding day workers until the plant-wide night differential was superimposed on the basic rates in 1944; since [which] time, it is apparent that the shift differential has been thought to compensate, fairly and adequately, employees other than inspectors for night work" (2d Cir. App. 207).

In direct conflict with these holdings, the courts below in No. 73–695 held the Equal Pay Act inapplicable to Corning's wage policies. The district court in No. 73–695 found that "except for the time of day worked, [the inspectors'] working conditions were the same," but concluded that a "given job performed at night

and at day is not performed under similar working conditions even though all other conditions are identical" (3d Cir. App. 180). The court, therefore, dismissed the Secretary's action without deciding any of Corning's other defenses. The Court of Appeals for the Third Circuit affirmed, on the basis of its reading of the Equal Pay Act's legislative history.

b. In No. 73–29, the courts below, having concluded that the jobs were equal and that the wage differentials could not be justified under the factor other than sex exception, next considered and rejected Corning's further contention that any equal pay violations on its part were cured when the night shift was opened to women. As the Court of Appeals for the Second Circuit explained, "Congress was quite specific * * * that an employer paying a wage differential violative of the Act should cure the violation by raising the wage rates of the women" (2d Cir. App. 210). "In light of this apparent congressional understanding, we cannot hold that Corning, by allowing some—or even many—women to move into the higher paid night jobs, achieved full compliance with the Act. Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration * * *" (2d Cir. App. 211).

c. Although the district court in No. 73–29 initially agreed with Corning that it cured the equal pay violations when, by its January 20, 1969 agreement, it established equal wage rates for the inspectors on all three shifts, it reversed itself at a subsequent hearing and held that this agreement—which also established

a higher "red circle" rate for night shift inspectors hired before January 20, 1969—unlawfully "perpetuates the [prior] discrimination" (2d Cir. App. 187). The court of appeals agreed, pointing out that any night shift inspector hired before January 20, 1969, still "receives as basic pay rate * * * some four to twelve cents per hour higher than [the basic rate] for the day and afternoon shifts" (2d Cir. App. 212).

SUMMARY OF ARGUMENT

1. The Equal Pay Act, we submit, forbids an employer to pay a higher wage to men performing work at night which is the same as the work done by women during the day when that higher wage (1) was adopted to induce men to perform "female work" and (2) is paid in addition to the night shift differential. The differentials challenged here plainly had their origin in sex. As the Second Circuit observed below the "differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called 'female work'" (2d Cir. App. 207–208).

We stress that the Secretary of Labor has never questioned Corning's right to pay shift differentials to compensate employees who work undesirable night hours. But the differentials here at issue had nothing to do with the fact that men inspectors were working at night: at the time that they were adopted Corning did not pay a shift differential and, when such a differential was adopted, it was simply added on to the higher base wage already being paid to men.

In the courts below the principal dispute has been

over whether time of day worked is a "working condition" as that phrase is used in the Act's definition of equal work, or is a "factor other than sex" to be used by an employer as a matter of defense. Both courts below agreed that if the time of day worked was a "working condition" then the Equal Pay Act was inapplicable to Corning's practices, however discriminatory. The Third Circuit found that time of day worked was a "working condition," whereas the Second Circuit concluded that time of day worked was a "factor other than sex" which was separately compensated by the shift differential and which therefore did not justify the wage differences at issue here.

We believe that the Second Circuit's "persuasive explanation of how the bill took shape" (2d Cir. App. 205) demonstrates that the statutory term "working condition" was used, as that term is used in job evaluation systems, to encompass only physical surroundings and hazards, and not time of day worked. The term was added to the Act's definition of equal work only after a Corning expert had urged Congress to expand its definition of equal work to include the factors found in most job evaluating systems: effort, skill, responsibility and working conditions. As used in those plans, working conditions comprise the subfactors of "surroundings" and "hazards."

We further believe that the Act applies in the circumstances of this case even if time of day worked is viewed as a "working condition." The sex-based discriminatory wages here involved are "the very condition at which the Equal Pay Act was aimed" (2d Cir. App. 208). These discriminatory wages do not become

lawful simply because the men being paid the higher wage work at night. As one of the courts below observed, the extra burden of night work "appears to have been taken care of by the fact that the men received * * * [a] differential for night work" (2d Cir. App. 162). Since the jobs are equal pay except for time of day worked and since that difference is in effect eliminated by the payment of shift differentials not in issue here, the jobs are equal under the Act.

2. Corning's contention that—assuming the jobs are equal—it cured prior violations of the Equal Pay Act when, without equalizing wages, it began to permit women to bid for jobs on the night shift, is without merit. The Act explicitly provides that an employer may not, in order to achieve compliance, "reduce the wage rate of any employee." The clear purpose of this *proviso* was to require the offending employer to equalize the wage rates without reducing the preferential higher wage, *i.e.*, to raise the lower wage. "The lower wage rate must be increased to the level of the higher" (H. Rep. No. 309, 88th Cong., 1st Sess, p. 3; 109 Cong. Rec. 9210). Plainly the vice of unequal pay for equal work was not cured by allowing some women to do the same work at night for higher base pay. The women remaining on the day shift still continued to do equal work for unequal pay. As the Second Circuit observed (2d Cir. App. 211): "Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential based (actually) on sex and still not justified by any other consideration * * *." Moreover, Corning also violated the no reduction *proviso* when it trans-

ferred certain men inspectors from the night shift to the day shift at a reduced rate wage level.

3. Corning's final contention that it cured any prior violations of the Equal Pay Act when it established equal rates for the inspector jobs on all three shifts, but at the same time retroactively increased the base rates for night shift inspectors, is similarly insubstantial. Had Corning equalized the rates for all three shifts it would have achieved compliance. However, at the same time, it provided retroactive pay increases dating back two months, which set higher rates for night shift inspectors than were established by the new uniform rates. Corning then "red circled" these retroactively established higher rates so that night shift inspectors then employed would continue to receive them even after the new uniform rates came into effect. As both courts in the New York case found, "the 'red circle' rate paid to night shift inspectors perpetuates the discrimination * * *" (2d Cir. App. 187, 212).

ARGUMENT

I

THE EQUAL PAY ACT FORBIDS THE PAYING OF A HIGHER BASE WAGE RATE, IN ADDITION TO A SHIFT DIFFERENTIAL, TO INDUCE MEN TO DO "FEMALE WORK" AT NIGHT

The wage differentials here at issue were based on sex. As Chief Judge Friendly stated for one of the courts below (2d Cir. App. 207–208):

> The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors

to perform what the men called "female work." This is the very condition at which the Equal Pay Act was aimed.

The wage differentials involved here did not reflect the fact that the higher-paid men inspectors worked at night. They began as an inducement to men to do "female work" and were simply added to the shift premiums when they were instituted in 1944. Since then, they have been carried forward in each collective bargaining agreement and exist today as the "red circle" rates for night shift workers employed prior to January 20, 1969.

The Secretary does not question Corning's right to pay additional wages to those of its employees who work undesirable night hours. Indeed, the Secretary's Interpretative Bulletin on the Equal Pay Act specifically recognizes the legitimacy of such differentials. See 29 C.F.R. 800.145. What the Secretary does challenge is Corning's right to maintain a wage differential which, although paid to certain employees working on the night shift, is completely unrelated to that fact, having its origin in sex, and is being paid *in addition* to the shift differential.

Neither the Second nor the Third Circuit questioned the propriety of maintaining shift differentials based upon the time of day worked. Both courts recognized, however, that the higher base wage paid to men inspectors for night work was not a shift differential, but was paid in addition to the shift differential (2d Cir. App. 198–199; 3d Cir. App. 198).

The courts differed, however, on whether the Equal Pay Act prohibits this discrimination in base wages

in the circumstances of these cases. Both courts started from the common premise that, if work performed at night and during the day was not work "performed under similar working conditions" within the meaning of the Act, then the Act did not reach the wage practices involved no matter how discriminatory and sex based they were. The Third Circuit concluded that the Act was "inapplicable" because "time of day worked is a 'working condition' within the meaning of the Equal Pay Act and not merely a 'factor other than sex' to be used by an employer as a matter of defense" (3d Cir. App. 207). The Second Circuit held, to the contrary, that time of day worked was not a "working condition," but a "factor other than sex" (2d Cir. App. 207). Since that court found that the greater burden of night work was separately and wholly compensated for by the contractual shift differential and that the work performed by the night shift inspectors did not otherwise differ significantly from the work of the inspectors on the other shifts,[11] the higher base wage for male inspectors on the night shift was not based on either a "factor other than sex" or a difference in "working conditions" and the Act was violated (2d Cir. App. 207–210).

We believe that the Second Circuit's "persuasive explanation of how the bill took shape" (2d Cir. App.

[11] Minor and insignificant differences will not make jobs unequal for the purposes of the Act. *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719 (C.A. 5); *Shultz* v. *American Can Co.-Dixie Products*, 424 F. 2d 356 (C.A. 8); *Shultz* v. *Wheaton Glass Co.*, 421 F. 2d 259, 264 (C.A. 3), certiorari denied, 398 U.S. 905; *Hodgson* v. *Daisy Manufacturing Company*, 445 F. 2d 823 (C.A. 8), affirming *per curiam* 317 F. Supp. 538, 551–552 (W.D. Ark.).

205) demonstrates that the statutory term "working conditions" was intended to encompass physical surroundings and hazards and not time of day worked (see pp. 25–32, *infra*.). However, we also believe that the Act applies in the peculiar circumstances of these cases under either reading of the statutory language. For even if "time of day worked" is considered a "working condition," the sex-based discriminatory wages involved here are forbidden by the Act. The statutory definition of equal work is not intended to remove from the Act's protection jobs which are substantially equal and whose differences are of a kind not usually considered for job evaluation purposes, are ignored when establishing wage rates as between employees of the same sex and are separately and independently compensated by a special differential geared to that difference. In these cases, time of day worked is a factor not considered in Corning's job evaluation programs and is ignored in fixing the base wage rates of Corning's men employees (since men in the noninspector jobs are all paid the same base rates regardless of their shift assignment). It is, moreover, a factor which can be and, in Corning's case, was separately and adequately provided for by a shift differential. Thus, regardless of whether "time of day worked" is a "working condition" or a "factor other than sex," the wage differential challenged here is not the one based on time of day worked (*i.e.*, the shift differential), but another separate and additional differential having its origins in considerations of sex (see pp. 32–35, *infra*).

A. THE TERM "WORKING CONDITIONS" DOES NOT REFER TO THE TIME OF DAY WHEN JOBS ARE PERFORMED BUT TO THEIR "PHYSICAL SURROUNDINGS" AND "HAZARDS"

Since Corning's job evaluation system has always treated the inspector jobs as equal, regardless of shift, these jobs are clearly equal within the meaning of the Act's equal work provisions, if the Act uses the term "working conditions" in the same sense that it is used in job evaluation plans. The Second Circuit's conclusion that the term "working conditions" was used in this technical way is strongly supported by the Act's legislative history. As originally introduced, the Act's equal pay requirement would have applied to "equal work on jobs the performance of which requires equal skills" (H.R. 3861, 88th Cong., 1st Sess.). During the hearings, however, Ezra G. Hester, Corning's director of industrial relations research, argued that this definition

> could give a great deal of difficulty to that large part of American industry and business which has relied upon the systematic methods of job evaluation for establishment of equitable rate relationships. Such job evaluation plans depend for their reliability upon other factors, than skill, alone. [Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 3861 and Related Bills, 88th Cong., 1st Sess. 232 (hereafter House Hearings); Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 882 and S.

910, 88th Cong., 1st Sess. 97 (hereafter Senate Hearings).]

Mr. Hester urged the use of job classification systems in the Act's definition of equal work:

> With this general acceptance of job evaluation throughout industry on the part of both management and labor, we feel it most desirable that legislation related to the equal-pay principle incorporate in its language, recognition of job evaluation (or job classification) principles that have been developed, accepted, and are in general use. [House Hearings, p. 233; Senate Hearings, p. 97.] [12]

Mr. Hester described job evaluation systems as follows:

> Job evaluation is customarily made up of four major factors, of which skill is one. The four factors embrace those aspects of job worth that are always considered by people, the employees, and the union as being important. These are: Effort, skill, responsibility, and working conditions. [House Hearings, p. 233; Senate Hearings, p. 98.]

"Working conditions," Mr. Hester specifically informed the Labor Subcommittees, comprise two "subfactors": "surroundings" and "hazards." House Hearings, pp. 234–236; Senate Hearings, pp. 98–99.

Similarly, Mr. S. Herbert Unterberger (whose views were sought by Congressman Griffin because of his special "experience as a Government official respon-

[12] Also urging the acceptance of job classification systems in the definition of equal work was Corning's counsel, John W. Wayman, who testified at Congressman Goodell's "request." House Hearings, pp. 139, 152.

sible for the administration of a substantial part of the National War Labor Board's program") advised that "virtually all of the students and technicians in the field of job analysis and evaluation * * * are agreed that the four principal factors in determining the relative value of a job are skill, responsibility, effort and job conditions." House Hearings, pp. 304–305, 307–308.

In response to this and other testimony, the bill was rewritten to incorporate the industrial practice of using "job classification systems." Thus, as the House Report on H.R. 6060 states (H. Rept. No. 309, *supra,* at 3; 109 Cong. Rec. 9210):

> The bill (H.R. 6060) refers to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."
>
> This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.

The role of "job classification systems" was similarly explained in the minority members' Supplemental Views (H. Rep. No. 309, *supra,* at 8; 109 Cong. Rec. 9211):

> The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working con-

> ditions as well. These factors are the core of all job classification systems and the basis for legitimate differentials in pay.

See also, 109 Cong. Rec. 9195.

This, as the Second Circuit recognized, is compelling evidence that the drafters of the legislation intended that the "similar working conditions" language should have the same meaning as in industrial practice—as exemplified by Corning's own job evaluation plan (*supra*, pp. 10–11; see 2d Cir. App. 203–205).

While "[t]his persuasive explanation of how the bill took shape" formed the core of the Second Circuit's reasoning in striking down these discriminatory wages, it is ignored in the Third Circuit's opinion. Instead that court focused on a single statement of a single representative, Congressman Goodell. Although he was not the bill's sponsor,[13] Congressman Goodell, as part of a

[13] Although Congressman Goodell introduced two of the 20 equal pay bills introduced during the first session of the 88th Congress (H.R. 5110 and H.R. 5605), his bills were never debated and the bill which formed the basis of the Act (H.R. 6060) was the one sponsored by Congresswoman Green. Congressman Goodell did suggest that the bill be enacted as an amendment to the Fair Labor Standards Act and this suggestion was adopted (109 Cong. Rec. 9197). The statutory definition of equal work appears to have originated with the industry representative discussed above: Congressman Goodell's first bill (H.R. 5110) contained no mention of working conditions and his second bill (H.R. 5605) was not introduced until after Mr. Hester had testified on March 27, 1973. (Corning errs in stating that Congressman Goodell introduced H.R. 5605 on March 25, 1963 (Corning Br., p. 23, n. 49). He introduced H.R. 5110 on that date (109 Cong. Rec. 4899) and H.R. 5605 on April 10, 1963 (109 Cong. Rec. 6210)).

Nor is there any indication in the legislative history that Congressman Goodell was the spokesman for the House Labor Committee or that he had any special responsibility for explaining

general summary of the bill, expressed the view that "difference in shift * * * would logically fall within the working condition factor" (109 Cong. Rec. 9209). But such a generalized statement made on the floor by one Representative concerning the meaning of the phrase "working conditions"—which, as is apparent from the legislative history, was used as a term of art—should not take precedence over the technical meaning of the term.

The Third Circuit also disagreed with the Second Circuit's view that the House Report described shift differentials, not in terms of the statutory standard of "equal work," but as a "factor other than sex" (3d Cir. App. 204–205). The disputed language of the House Report reads as follows (109 Cong. Rec. 9210):

> The bill (H.R. 6060) refers to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."
>
> * * * * *
>
> Three specific exemptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion ["a differential based on any other factor other than sex"] has been also included. Thus, among other things, shift

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the bill's intent (Corning Br., p. 23). On the contrary, it was Congressman Thompson who, as Chairman of the Labor Subcommittee, summarized the Committee Report, and he did this before Congressman Goodell made any of his statements (109 Cong. Rec. 9196, 9209).

> differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. * * *

Although describing this language as "ambiguous," the Third Circuit found "no basic conflict between [it] * * * and Congressman Goodell's statements" (3d Cir. App. 205–206). Under its interpretation, examples listed in the House Report are not solely illustrations of exceptions under the "broad general exception" but rather "a chiaroscuro picture" of both the exceptions and the equal work requirements (3d Cir. App. 204). For example, the Third Circuit equated the example of "lifting or moving heavy objects" to the usual "effort" factor in the Act's equal work definition. The Committee's example, however, refers to "*restrictions on* or differences based on * * * [the] lifting or moving of heavy objects," and to "*restrictions on* or differences based on time of day worked, hours of work" (emphasis added).[14] Thus the reference may have been to State protective laws applicable to most women workers. See, *e.g.*, 109 Cong. Rec. 9205–9206. The Third Circuit also equated the example of "differences based on experience, training, or ability" to the "skill" factor. But, obviously, individuals of differing qualifications ("experience, training, or ability") may be assigned identical jobs requiring the same skills. And, since the House Report expressly states that all of the examples are

[14] The Third Circuit's quotation of the House Report inadvertently omitted the words "restrictions on or differences" (3d Cir. App. 203).

"differences" which "would * * * be excluded," the reference appears to be, not to the statutory definition of equal work, but to the exceptions specified in the statute—namely, the "[t]hree specific exemptions" of seniority, merit or the quantity or quality of production and the "one broad general exception" (factor other than sex). The need for these exceptions, in addition to the equal work definition, was emphasized by Mr. Hester, who stated that "individual rates of pay will lie within the rate range according to the individual's seniority and performance" (House Hearings, p. 233; Senate Hearings, p. 98).

In any event, whether the House Report is ambiguous, as the Third Circuit thought, or clear, as the Second Circuit concluded, there is no doubt as to the origin of the statutory term "similar working conditions"—an origin which seems to us to be of controlling weight in determining the congressional intent. The terms "working conditions," as the Second Circuit recognized, has a well defined meaning "in the language of industrial relations" which was specifically emphasized in the hearings; when "read in the way the experts would understand it," it refers to the physical surroundings and hazards of a job and not to the time of day during which the job is performed (2d Cir. App. 202–203).[13] Cf. *Cheng Fan Kwok* v. *Immigration Service*, 392 U.S. 206, 212.

[13] Job evaluation systems developed by the National Metal Trades Association, the National Electrical Manufacturers Association and the steel industry, all use the same definition of working conditions as the Corning Glass Works plan (Belcher, *Wage and Salary Administration*, pp. 271–274, 278, 287–289 (1955)). *The Dictionary of Occupational Titles*, vol. II, p. 656

The time of day worked, according to Corning's own expert witness, is not a working condition but a "wage condition" (*supra*, p. 11). It is thus a "factor other than sex" for purposes of the statute and justifies only that part of the wage differential which compensates the night shift employees for working undesirable hours (in this case the shift differential). The additional amount paid to night shift inspectors (the difference in base wages) constitutes an unlawful wage differential based on sex.

B. EVEN IF TIME OF DAY WORKED IS A "WORKING CONDITION" WITHIN THE MEANING OF THE ACT, DIFFERENCES IN SHIFT, WHERE SEPARATELY COMPENSATED, DO NOT MAKE OTHERWISE EQUAL JOBS UNEQUAL

Even if time of day worked is considered a "working condition" for purposes of the Equal Pay Act, the jobs involved here nonetheless are "equal work." The contrary holding of the Third Circuit rests, we believe, on an unduly narrow conception of the Act's basic purpose and consequent reach. As the Second Circuit succinctly explained (2d Cir. App. 207–208):

> The plain fact is that the differentials here at issue arose because men would not work at the low rates paid the women day-time inspectors to perform what the men called "female work."

(3d ed. 1965), United States Department of Labor, also defines working conditions as "the physical surroundings of a worker in a specific job," such as: "inside work v. outside work, exposure to heat, cold, wetness, humidity, noise, vibration, hazards (risk of bodily injury), fumes, odors, toxic conditions, dust and poor ventilation." See also the United States Civil Service Commission's *Job Grading System for Trades and Labor Occupations*, FPM Supplement 512–1, p. A3–3, which has an almost identical definition of "working conditions."

> *This is the very condition at which the Equal Pay Act was aimed.* * * * [Emphasis added.]

It was the manifest purpose of the Act to eradicate sex based wage discriminations. To accomplish this end Congress developed a concept of equal pay for equal work (S. Rep. No. 176, 88th Cong., 1st Sess., 109 Cong. Rec. 8914). The Act defines equal work as "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions." The key element of course is "equal work," and the language concerning "equal effort, skill and responsibility" and "similar working conditions" was obviously intended as a standard for determining what constitutes "equal work."

Here the difference in shift worked is a difference in what we are assuming to be "working conditions" which is not peculiar in any way to the inspectors, but similarly affects those on other jobs which are performed on all shifts. Moreover, it is a discrete difference for which all affected workers, including inspectors, receive discrete separate compensation by means of the payment of a plantwide shift differential. Since the asserted differences in "working conditions" thus has nothing to do with the base pay differential at issue, it does not serve to make otherwise equal work unequal. As the Court of Appeals for the Fifth Circuit observed in *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719, 723, n. 3:

> Under the [Equal Pay] Act, where pay is unequal, no dissimilarity in working conditions

> is relevant unless it somehow explains the pay differential. * * *

To put the matter another way, the shift difference is eliminated for purposes of the Act—or, in the statutory language, the shifts are made "similar"[16]—by payment of the shift differential. As the district court in No. 73–29 stated (quoting *Wirtz* v. *Dennison Manufacturing Company,* 265 F. Supp. 787, 790, n. 1 (D. Mass.)):

> "this element (working less desirable night shift) appears to have been taken care of by the fact that the men received an additional allowance over and above the basic rate under the company's regularly established differential for night work." This court is in accord that a differential such as the Corning-wide night differential adequately compensates employees for working undesirable times of day * * * [2d Cir. App. 162].

See also, *Hodgson* v. *Miller Brewing Company,* 457 F. 2d 221, 224–225, n. 8 (C.A. 7), where the court rejected the argument that women did not perform "equal" work since they were not allowed to work on the night shift, noting that "the 70 cents more at night was in addition to the shift differential of 10 to 16 cents an hour." And see *Wirtz* v. *Basic Incorporated,* 256 F. Supp. 786, 791 (D. Nev.).

In short, where jobs differ only in respect to a discrete condition or factor, such as time of day, which

[16] Significantly, the Act does not require that "working conditions" be "equal," but only that they be "similar." By contrast, the bill introduced by Congressman Goodell would have required "working conditions" to be "equal" (H.R. 5605, 88th Cong., 1st Sess.).

is separately and independently compensated by a differential geared to that condition and where the base rate of pay therefore reflects no difference in working conditions (however defined), the jobs are equal for purposes of the Equal Pay Act.

The holding of the Third Circuit that a single difference in the "working conditions" of otherwise identical jobs render the jobs unequal should therefore be rejected, even if support for it can be found in some statements in the legislative history. Our construction of the Act is obviously the one that is more consistent with the "policy of the legislation as a whole" (cf. *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543; *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315, 333; *United States* v. *Katz*, 271 U.S. 354, 357), since it would otherwise be lawful under the Act (in some circumstances) to pay wage differentials which are based solely on sex—which is the very basis for differential payment that the Act was intended to prohibit.

II

THE EQUAL PAY VIOLATIONS WERE NOT CURED WHEN CORNING, WITHOUT RAISING THE DISCRIMINATORY FEMALE INSPECTOR RATES, OPENED UP ITS MALE JOBS TO WOMEN AND ITS FEMALE JOBS TO MEN

Corning contends (Corning Br., pp. 38–50) that—assuming the jobs to be equal—it cured any violations of the Equal Pay Act when, without equalizing the wage rates, it began to permit women to bid for jobs on the night shift as vacancies occurred. In rejecting this contention, the Second Circuit followed the hold-

ing of every other appellate court which has ruled on the issue.[17] See *Shultz* v. *American Can Co.-Dixie Products*, 424 F. 2d 356, 359 (C.A. 8); *Hodgson* v. *Square D Company*, 459 F. 2d 805, 808–809 (C.A. 6); *Hodgson* v. *Miller Brewing Co.*, 457 F. 2d 221, 226–227 (C.A. 7).[18]

As the Second Circuit stated (2d Cir. App. 210–211):

> Congress was quite specific how the injustice of unequal pay for equal work must be eradicated. * * * [I]t provided that an employer paying a wage differential violative of the Act should cure the violation by raising the wage rates of women. * * *
>
> In light of this apparent congressional understanding, we cannot hold that Corning, by allowing some—or even many—women to move into the higher paid night jobs, achieved full compliance with the Act. Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration * * *.

This conclusion is supported by the language of the Act and all pertinent legislative history. The declared

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[17] The Third Circuit, in No. 73–695, did not reach the question, because it held the Act "inapplicable" altogether (3d Cir. App. 207).

[18] Neither *Square D* nor *American Can Co.* can be distinguished on the basis, suggested by Corning (Corning Br., pp. 46–47), that "the women had not actually been able to transfer to [the male] jobs." Both rest instead on the principle that the women were entitled to the higher male rate for the work they were already performing, thus eliminating any need to transfer to the male jobs.

purpose of the Equal Pay Act was to correct "depress[ed] wages and living standards" caused by "wage differentials based on sex" (Section 2(a), 77 Stat. 56).[19] To achieve this end, the Act first prohibits unequal pay for equal work in the language we have discussed earlier, and then specifies (29 U.S.C. 206 (d)(1)):

> *Provided,* That an employer who is paying a wage differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

As was repeatedly emphasized in the legislative history, the purpose of this *proviso* was to require the offending employer to equalize the wages without reducing the preferential higher wage, *i.e.,* to raise the lower wage. Thus the House Report stated (H.Rep. No. 309, *supra,* at 3; 109 Cong. Rec. 9210): "The lower wage rate must be increased to the level of the higher." Similarly Congressman Thompson, the Chairman of the Labor Subcommittee, said during the House debates on the bill (109 Cong. Rec. 9196): "The lower wage rate must be increased to the higher level so that there will not be an adverse effect on already established wage patterns." And as Congresswoman Dwyer remarked, "The objective of equal pay legislation * * * is not to drag down men workers to the wage levels of women, but to raise women to the levels enjoyed by men in cases

[19] Note also the statement of President Kennedy, in signing the bill, that the measure was intended to provide "reasonable levels of income" to women workers (XXI Cong. Q. No. 24, p. 978, June 14, 1963).

where discrimination is still practiced" (109 Cong. Rec. 2714). See also S. Rep. No. 176, *supra;* 109 Cong. Rec. 8915.

Manifestly, the vice of unequal pay for equal work is not cured by allowing some—but not all—of those receiving a depressed wage to bid for an opportunity to do the same work at the higher wage. By hypothesis day and night inspection work are equal work; by statute, then, day and night inspectors must receive equal pay (except for shift differentials). It hardly satisfies the equal pay requirement to allow some day inspectors to work at night for higher pay: the rest of the day inspectors (as well as those brought in to replace the ones transferred to the night shift) are left doing equal work for unequal pay. As the Second Circuit correctly observed (2d Cir. App. 211); "Corning's action still left the inspectors on the day shift—virtually all women—earning a lower base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration * * *."

Corning's semantic argument (Corning Br., pp. 38–50) that "shall not * * * reduce" does not mean "shall increase" misses the point. While Corning did not reduce the wage rates for night work, neither did it equalize the pay for equal work as the main body of the Act requires. Thus we need not reach the issue whether Corning has complied with the no-reduction *proviso;* it did not comply with the core requirement of equal pay for equal work.

Moreover Corning errs in asserting (Corning Br., p. 40) that "[t]here was neither proof in the record nor

any finding by any of the courts below that any employee's wage rate had been reduced." The District Court for the Western District of New York found (2d Cir. App. 154, 181) that "since June, 1966, some men inspectors have taken day and afternoon inspection jobs with the reduced base hourly wage rate" and that "payment of a lower rate to the day and afternoon shift inspectors was sex-based and illegal, and that men as well as women were damaged momentarily when, after June 1, 1966, men worked at the previously all-female day and afternoon inspector jobs at a reduced base hourly wage rate." [20] Plainly, therefore, the maintenance of unequal rates for day and night inspection jobs not only continued the effect of past discrimination; it also resulted in reduced wage rates for the men transferred to the day and afternoon

[20] In response to written interrogatories, Corning listed the names of 54 men at its New York plant who accepted inspection jobs on the day or afternoon shift (2d Cir. App. 54–55). Although many of these men had not previously been employed as inspectors, seven of them came directly from one of the night shift inspector jobs. (These jobs are identified as No. 1377, night TV inspector, and No. 4671, night General TV inspector. See Pltf's Exh. 12, introduced at I Tr. 26 and admitted at II Tr. 253.) The seven men were G.A. Giannini, a General TV Inspector, who worked for five weeks on the day shift at $.195 less per hour than his night shift rate; W. R. Helms, a General TV Inspector, who worked for three weeks at a reduction of $.195 per hour; F. C. Morton, a General TV Inspector, who worked for six weeks at a reduction of $.195 per hour; D. E. Stabley, a General TV Inspector, who worked for less than one week at a reduction of $.195 per hour; D. P. Murphy, a TV Inspector, who worked for thirty-seven weeks at a reduction of $.085 per hour; B. T. Hoad, TV Inspector, who worked for seven weeks at a reduction of $.045 per hour; and R. L. Smith, a TV Inspector, who worked for twelve weeks at a reduction of $.045 per hour.

shifts in violation of the Act's provision against rate reduction. See *Shultz* v. *American Can Co., supra,* 424 F. 2d at 359; *Hodgson* v. *Miller Brewing Co., supra,* 457 F. 2d at 226.

In addition, as the Second Circuit noted, even after the night jobs were opened to women, virtually all the inspectors on the day and afternoon shifts were women so that "in effect Corning was still taking advantage of the availability of female labor to fill its day shift at a differentially lower wage rate not justified by any factor other than sex" (2d Cir. App. 211). For example, in New York on June 2, 1968 only three of the 214 day and afternoon shift inspectors were men, and two of them had been in the job for one week and the third had been in the job for three weeks (Pltf.'s Exh. 12, computer printout, introduced I Tr. 26, admitted II Tr. 253).

Corning's argument that it was not required to raise the day wage rates to equal the night rates rests on an erroneous view of the effect of changes made in the bill following the subcommittee hearings. The bill originally considered by the subcommittee (H.R. 3861) was not, as Corning suggests (Corning Br., p. 44), more explicit than the later Green bill (H.R. 6060) in requiring that the lower wage rates be raised. Although H.R. 3861 would have established a procedure for the gradual upward adjustment of wages over a two-year period, it also called for conciliation and, like the bill which had passed the House in 1962,[21] did

[21] The 1962 bill, as originally introduced, prohibited rate reduction (H.R. 11677, Section 4, 87th Cong., 2d Sess., reprinted at 108 Cong. Rec. 14765–14766), but that language was deleted by an amendment offered by Congressman Goodell (108 Cong. Rec. 14771, 14773).

not specifically prohibit the lowering of wages.[22] The omission in H.R. 3861 of an absolute ban on reduction of wages to achieve equality was sharply criticized later in the hearings. See House Hearings, p. 115. To meet these objections, the bill which emerged from the hearings and became law contained an express *proviso* against rate reduction (29 U.S.C. 206(d)(1), *supra*, p. 37).[23] This *proviso*, as the House Report stressed, was intended to insure that "the lower wage rate[s] [would] be increased to the level of the higher" (H. Rep. No. 309, *supra*, at 3, 109 Cong. 9210).

Nor is there merit in Corning's claim (Corning Br., p. 48) that the decision below conflicts with the intent of "Congress * * * to afford maximum flexibility to free collective bargaining in adjusting rate relationships." While the Act does not interfere with matters which are the legitimate subjects of collective bargain-

[22] Thus when Congressman Griffin complained that H.R. 3861 would require "the lower wages to be raised to the higher" and that this might create an impossible economic hardship for some businesses (House Hearings, p. 65), Secretary of Labor Wirtz responded that "as administrator under the act," under the conciliation provisions of H.R. 3861, his "every disposition would be to accept * * * [a] mutually satisfactory arrangement" which would adjust wages to a livable level for the employer (House hearings, p. 65).

[23] In place of the provision permitting the gradual upward adjustment of wages, which was of great concern to employer groups (House Hearings, pp. 99, 136, 159–160, 193, 199, 241, 250–251, 278–279; Senate Hearings, p. 132), the bill delayed the effective date of the Act for at least one year, and, in the case of certain union contracts, for a period of two years (Section 4, 77 Stat. 57). See 109 Cong. Rec. 8915, 9199, 9203, 9207, 9210.

ing, it was recognized repeatedly during the debates on the equal pay provisions that unions may seek to enter into discriminatory agreements (109 Cong. Rec. 9198–9199, 9209; 108 Cong. Rec. 14751–14752). It was for this reason that Congress enacted Section 6(d)(2), 29 U.S.C. 206(d)(2), which specifically prohibits labor organizations from causing or attempting to cause an employer to discriminate in violation of the Act. The rights to equal pay for equal work, like other rights under the Fair Labor Standards Act, cannot be waived (*Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697; *Schulte, Inc.* v. *Gangi,* 328 U.S. 108). They are substantive rights created by federal legislation, which is not subject to repeal by means of the collective bargaining process. As the Court started this Term with respect to a similar question under Title VII of the Civil Rights Act of 1964 (*Alexander* v. *Gardner-Denver Co.,* No. 72–5847, decided February 19, 1974, slip op. 14–15):

> Title VII * * * concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. * * *

III

THE EQUAL PAY VIOLATIONS WERE NOT CURED WHEN CORNING ESTABLISHED EQUAL RATES FOR INSPECTION JOBS ON ALL THREE SHIFTS, BUT SIMULTANEOUSLY SET NEW HIGHER "RED CIRCLE" RATES FOR NIGHT SHIFT INSPECTORS THEN EMPLOYED

Corning finally contends (Corning Br., pp. 50–53) that it achieved compliance with the Equal Pay Act when, by a January 1969 collective bargaining agreement, Corning established a single "job evaluation" rate for each of its inspector jobs which was the same for all three shifts. We agree with the Second Circuit that "[i]f the agreement had stopped at that point, there could be no substantial claim of further violation of the Equal Pay Act" (2d Cir. App. 200).

However, Corning did not stop at that point; it also provided retroactive pay increases dating from November 4, 1968, which set rates for night shift inspectors that were higher than the new "job evaluation" rates for inspectors on all three shifts. Corning then "red circled" these retroactively established higher rates, so that night shift inspectors employed on the effective date of the January 1969 agreement would continue to receive them after the new "job evaluation" rates came into effect (2d Cir. App. 177; see p. 14, n. 10, *supra*).

In this manner the wage discrimination which existed prior to January 1969 (and which was by hypothesis illegal) was carried forward for the indefinite future. As both of the courts in the New York case found, "the 'red circle' rate paid to night shift inspec-

tors perpetuates the discrimination * * *" (2d Cir. App. 187, 212).

It is clear that the purpose and effect of the red circle rates is to continue a differential between the day and afternoon shift inspectors and the night shift inspectors, rather than to reward seniority as Corning suggests (Corning Br., p. 51). This is shown by the fact that the red circle rates do not follow night shift inspectors with seniority who transfer into day or afternoon shift inspector jobs, although the two jobs are by hypothesis equal (2d Cir. App. 184). Moreover, although the new uniform rates (rather than the higher red circle rates) are theoretically applicable to night shift inspectors hired after the effective date of the 1969 agreement, since that date, at least in New York, no one has been newly employed as a night shift inspector; nor is anyone likely to be for some time, since, as noted by the district court in No. 73–29, "there are about 500 employees currently on layoff who must be offered an inspection job before it can be offered to a new employee" (2d Cir. App. 184).

On these facts, the Second Circuit's holding that the 1969 agreement did not cure Corning's equal pay violations was correct and accords with the numerous decisions under Title VII striking down practices which, although "neutral on their face, and even neutral in terms of intent, * * * operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430; *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 659 (C.A. 2); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799, certiorari dismissed, 404 U.S. 1006.

CONCLUSION

The judgment of the court of appeals in No. 73–29 should be affirmed, and that of the court of appeals in No. 73–695 should be reversed.

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